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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

DENISE PESKA, Appellant, vs. SOUTH CENTRAL HEALTH DISTRICT, Respondent.	)	IPC NO. 03-12 DECISION AND ORDER ON PETITION FOR REVIEW

THIS MATTER CAME FOR HEARING ON PETITION FOR REVIEW on June 15, 2004. Appellant Denise Peska ("Appellant" or "Peska") was represented by John C. Lynn; Respondent South Central Health District ("Respondent" or "District") was represented by Thomas D. Kershaw, Jr. The petition for review involves the hearing officer's decision dated December 5, 2003. **WE REVERSE.**

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Disciplinary Action

This is a discipline case under IPC Rule 190. IDAPA 15.04.01.190.01e. Peska appealed to the Commission from the District's decision to terminate her. The District imposed Rule 190 discipline pursuant to the following alleged reasons:

(1) Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department;

(2) Violation of agency policy .230 Harrassment-Free Workplace.

IDAPA 15.04.01.190.01e. Specifically, the District alleged that Peska displayed a "pattern of behavior with customers that generated complaints that resulted in a performance improvement plan since August 2002 and followed by a complaint on January 9, 2003 from a new employee reporting feelings of intimidation and coercion while being trained by you". Exhibit A, p. 67, Letter of Termination dated January 22, 2003.

B. Facts

The District employed Appellant for 4 ½ years prior to her termination on January 22, 2003. She was a classified state employee; specifically she was a certified Environmental Health Specialist II with principal job responsibilities of conducting inspections at food establishments and day care centers to ensure adherence to state and federal regulations. From the hearing before the Hearing Officer and from the thick volume of exhibits admitted to the record in this matter comes evidence of a history of problems the District experienced with respect to Peska's job performance. Problems included conflicts with co-workers and poor working relationship with staff (Exhibit B[1], pp. 15, 21, 24, 26, 28; Testimony of Meryl Egbert, Tr. pp. 187-192, 213-214), excessive use of sick leave and absenteeism (not relied upon as a reason for dismissal), attitude and demeanor problems (intimidation and abuse of authority) with food establishment owners when performing inspections (Exhibit I, p.2, Exhibit J, p. 2 Exhibit A, p. 29; Testimony of Meryl Egbert, Tr. pp. 192-197, 201-02), email policy violations (Exhibit B, p. 25, Exhibit A, p. 6, Testimony of Meryl Egbert, Tr. pp. 173-75), and improper use of an agency vehicle

[1] Exhibit B is a compilation of Appellant's former supervisor's (Meryl Egbert) notes which purportedly reflect issues with Appellant's performance (among other things) documented by Mr. Egbert over Appellant's entire employment history with the District.

(Exhibit B, p. 30, Exhibit A, p. 10, Testimony of Meryl Egbert, Tr. p. 177-78). All of these allegations are a part of the Hearing Officer's findings of fact in the underlying decision.

Towards the end of Peska's employment and then at the very end of her employment are two dominating events that precipitated her termination.

1. The Quality Fresh Complaint Letter of July 23, 2002.

On July 23, 2003 Clarence Shook, the major stockholder of Quality Fresh Foods (a Twin Falls food producer) sent a letter of complaint ("Quality Fresh Complaint" or Complaint) to the District's Assistant Director, Dan Kriz. It is set out at Exhibit A, p. 24. This Quality Fresh Complaint addressed two issues: (1) Appellant's conduct during a food inspection in 1998 (although the letter did not identify or clarify the date of that food inspection) and (2) allegations that Appellant was telling customers that Quality Fresh product was bad and that it was costing Quality Fresh customer business. The Complaint named one particular customer by first name only, Debbie [Cottle] at Balanced Rock Coffee Shop and provided her phone number. Exhibit A, p 25. Neither Heidi Opheim (Appellant's supervisor at the time of the letter) or District Director Cheryl Juntenum realized that the food inspection allegations referenced a food inspection four years earlier, (Tr. pp. 39, 142) and had been addressed then. Exhibit B, pp. 16-17.

There is no evidence that the District investigated the allegations of the Quality Fresh Complaint and no one from Quality Fresh testified at the hearing about the Complaint. Deborah Cottle did testify at the hearing and completely refuted the allegation by Shook that Appellant had disparaged his product. Tr. 490-496. In fact, Cottle testified her discontinuation of business with Quality Fresh didn't have anything to do with Peska. Tr. p. 491. She had called Peska to ask a general question about the shelf life of potato salad and later relayed her answer to Quality

Fresh. Tr. pp. 492-93. She testified Peska had no information as to why the question was asked or what business was involved. Tr. pp. 494. Although Cottle contacted the District after the Quality Fresh Complaint to offer praise of Peska, apparently no one at the District ever contacted her to inquire about the Complaint. Nor is there any evidence that the District contacted Quality Fresh or Mr. Shook after receiving the Complaint.

The allegations contained in the Quality Fresh Complaint were included as part of a one-page letter of reprimand on August 20, 2002. Exhibit A, p. 35. Appellant was not notified of the Complaint prior to receiving the reprimand. Soon after actual receipt of the Quality Fresh Complaint and surely instigated by it, the District decided some investigation was warranted to find out more about Appellant's relationship with her clients (although the evidence shows no investigation was given the Quality Fresh Complaint, itself). Therefore, Ms. Opheim conducted a random survey of a number of Appellant's clients from the previous quarter. The results were recorded (Exhibit A, pp. 32-34) and generally revealed about half had bad things to say and half had good things to say.

This was unacceptable to the District (Tr. pp. 19-21, 24-25) and it was determined that Appellant be put on a performance improvement plan on October 9, 2002, (Exhibit A, pp. 40-41), which addressed reliability and productivity issues (not alleged as basis for termination) and addressed the survey results and the District's concern with Appellant's client relationships. Exhibit A, p. 41. The plan indicated:

> "In three month's time, a new survey will be completed using Denise's customers visited during this time. Her absences will also be reviewed, for improvement.
>
> An outcome report will be reviewed with Denise and the Environmental Health Director on or before January 1, 2003. A decision will be made at that time as to Denise's employment status, including being removed from any improvement plans, continuing with improvement or other disciplinary actions up to and including termination."

Id.

This new survey was never done. Opheim and Egbert both went on inspections with Appellant during the plan and they "went okay". Tr. p. 69-70. The plan was also superceded by Appellant's last Performance Evaluation Summary (Exhibit A, pp. 42-45) signed by Ms. Opheim on November 20, 2002 which, like all of her Performance Evaluations while employed at the District, resulted in an Overall Rating of "Achieves Job Requirements".

2. The Vonia Jackson Complaint

Vonia Jackson ("Jackson") was a new employee hired in September 2002. Prior to January 8, 2003, she had spent 2½ days in training on food inspections with Appellant, one such session on December 19, 2002. Prior to January 8, Jackson voiced no concerns over her training with Appellant. However, on January 8, after the training, she advised Mr. Egbert she no longer wanted to be trained by Appellant. Tr., pp. 350, 380. Mr. Egbert asked Jackson to write up her complaints (Tr., pp. 227, 229, 363, 380-81).

Mr. Egbert then wrote up an Incident Report recommending Appellant be "removed as Vonie's trainer." Exhibit A, pp. 49-50. Jackson's complaint consisted of two events: (1) December 19, 2002, event concerning Cindy Scott set out in Exhibit A, pp. 61-62, and (2) the events of the January 8, 2003, training day with Appellant set out in Exhibit A, pp. 57-60.

(a) Cindy Scott's Christmas Party

Jackson claimed that while at lunch on December 19, 2002, with Appellant and her husband before a training session, Appellant told her that she had told Cindy Scott that Jackson had bragged about the Christmas party this year. Exhibit A, p. 61. This really bothered Jackson because she had not bragged about the party and she later called Cindy Scott. Jackson was very upset because she felt Appellant brought up personal things (Tr., pp. 366-67) and she had to

convince people she hadn't said anything about the party and even felt "violated" by the incident. Jackson testified she created this "Incident # 1" part of the complaint the night it happened, for herself (Tr., pp. 363-64), but also testified she added "some of this stuff" after being asked to write up her complaint by Mr. Egbert on January 8, 2003. *Id.* Particularly, Jackson added the last paragraph claiming that Cindy Scott told Jackson she "is worried about retribution from Denise through her position as health inspector." Exhibit A, p. 62; Tr. p. 363. No one from the District ever contacted Scott about this fear of retribution.

Appellant denied making the Christmas party comment at the lunch with Jackson. Her husband also testified that Cindy Scott never came up in conversation at the lunch. Tr., p. 506. Cindy Scott testified she never told Jackson she feared retribution from Appellant. Tr., p. 289. In fact, when she discovered the accusation after Appellant's discharge, she called Heidi Opheim to "make sure they understood that I did not fear retaliation from Denise." Tr., p. 290. During her testimony, Scott also testified that she never told Jackson she was friends with Appellant because she "felt sorry for her," like Jackson reported in her complaint. Exhibit A, p. 61; Tr., p. 299.

(b) January 8th Training Day

The events of January 8 are highly disputed between Appellant and Jackson, at least from their perspectives. It is Jackson's subjective perspective and the resulting written complaint (Exhibit A, pp. 57-60) of the training day that the District based its allegation of violation of agency policy on harassment. Notice of Contemplated Action (hereafter "NOCA"), Exhibit A, p. 51 ("new employee reporting feelings of intimidation and coercion, including showing up at the employee's home on January 8, 2003, after work hours in spite of being told not to come"). Jackson's complaint starts off with a feeling of irritation when she realizes Appellant has arrived

and is standing behind her and hadn't made her presence known. Exhibit A, p. 57. Partly stemming from the Cindy Scott episode, Jackson was apprehensive about training with Denise and didn't want to be trained by Appellant. Tr., pp. 367-69. Jackson characterizes Appellant's behavior as "badgering" when Appellant asked multiple questions that morning concerning Jackson's quiet demeanor, although her questions also sounded "concerned" and "thoughtful." Exhibit A, p. 57. Jackson also felt Appellant "over-stressed" Jackson's training status and felt it made her "sound incompetent" wherever they inspected. *Id.* There is no evidence of any friction noted while inspecting the food establishments that morning. In fact, Exhibit L contains letters from three of the establishments visited (Exhibits 35-37 in Exhibit L), and none state witnessing any friction between the two.

That afternoon, Jackson was to train on septics with Bill Beck in Hagerman and Appellant decided to go along, unplanned (according to Jackson), in order to inspect a couple food establishments in the area. Appellant testified Mr. Egbert knew about going to Hagerman and she had gotten permission from him (Tr., p. 527), and Mr. Egbert's Incident Report confirms this. Exhibit A, p. 49. Jackson claims Appellant "made a big issue" out of Jackson's plan to ride down with Mr. Beck and wanted Jackson to ride with her, so she did. Exhibit A, p. 58. Jackson states Appellant is "irritated" on the ride down and also raises an issue about whether Jackson should leave her purse in the car when they arrive. Jackson felt Appellant was "belligerent" on this subject. *Id.* Appellant testified the drive was uneventful except she was developing a migraine headache and had no issue with Jackson taking her purse with her. Tr., pp. 531-32. Upon Appellant's return to the septic site from her food inspections, Jackson is uncomfortable with her presence and expresses feelings of being stalked and indicates Appellant "butted in" where there were questions asked during the septic inspection (Exhibit A, p. 59), although Mr.

Beck testified he didn't recall that. Tr., p. 322. Beck also told Egbert he was not aware of any conflict going on between Appellant and Jackson. Tr., pp. 255-56.

Before Appellant left Hagerman, without Jackson, Appellant told Jackson she had a video for her to watch and Jackson indicated "that would be great" and they could "connect later on that." Exhibit A, p. 59; Tr., p. 350. Later that afternoon, Jackson called Egbert with her request that she no longer be trained by Appellant and mentioned the Scott incident of three weeks prior. *Id.*; Tr., pp. 226-229. It is at this point, as mentioned above, that Jackson was asked to put her complaint in writing.

In her complaint and testimony at the hearing, Jackson stated Appellant left a message, while she was speaking to Egbert, wanting to meet at the Buhl Sav-Mor to give her the video, and also later that evening at home Appellant called demanding to know what Jackson spoke to Egbert about. Tr., pp. 354-356; Exhibit A, p. 59. Appellant testified she only returned Jackson's phone call that evening and there was no discussion or questioning concerning any Jackson and Egbert telephone conversation. Tr., pp. 535-36. It was during this conversation that the video was discussed and Jackson asked Appellant not to bring it over that night. Tr., pp. 356-57, 536. Jackson further testified Appellant called her again the next morning asking about her conversation with Egbert and also to inquire of future training dates. Tr., pp. 357-58. Appellant denied ever asking Jackson about her conversation with Egbert and testified she wasn't aware Jackson had spoken to Egbert at that time. Tr., p. 537. On January 9, Appellant dropped off the training video at Jackson's home after work. Jackson wasn't home and Appellant left it with her husband. Tr., p. 536.

3. District Action

It is the Jackson complaint that the District felt was the "final straw" and set her termination in motion. After Jackson put her complaint in writing, and Egbert wrote the Incident Report of January 9, 2003, Opheim, Egbert, and Dan Kris (Egbert's supervisor) met and agreed it was time to terminate Appellant. Tr., pp. 230-31, 237-38. Therefore, on the 14th, Opheim and Egbert met with Director Junetenun and it was during this meeting that Junetenun expressed her intent to terminate Appellant. Tr., pp. 78-79. Appellant was placed on administrative leave and given the NOCA that day. Exhibit A, p. 51.

The NOCA stated in pertinent part:

> I am writing to notify you that I believe you are in violation of the Division of Human Resources rule 190.01e. (Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department) and Agency Policy .230 Harassment-Free Workplace. Your supervisor received a written complaint from a new employee reporting feelings of intimidation and coercion, including showing up at the employee's home on January 8, 2003 after work hours in spite of being told not to come. This infraction comes during a time of performance improvement planning efforts for you following a Letter of Reprimand of August 20, 2002 for serious complaints by a customer related to your rude behavior and offensive language.
>
> Because you violated the above rule after receiving a former written reprimand for similar behavior[2], I am now considering dismissal.

Id. (footnote added).

Appellant met with Director Junetenun on January 21, 2003 to respond to the NOCA allegations. Exhibit A, p. 65 reflects Junetenun's notes of that meeting with Appellant and indicates Appellant disputed the Quality Fresh Complaint allegations about rude behavior and offensive language and was surprised to see the allegations from 1998 again. The notes also

[2] There is evidence of one written reprimand (other than the discussed August 20, 2002 Reprimand) in the record. Exhibit A, p. 10. It concerned violation of a travel policy for using a state vehicle for personal use and is not an alleged basis for termination. Nor is it "similar behavior" to what was contained in the NOCA as alleged basis for termination.

reflect that Junetenun "reviewed the content" of the Jackson complaint with Appellant "including the intimidation and coercion and complaint of coming to her house when told specifically not to come." *Id.* The notes of the January 21st meeting and the testimony at the hearing evidence only discussion of the Quality Fresh Complaint and the Jackson complaint at the meeting, as referenced in the NOCA.

Jackson was terminated the next day by Letter of Termination, dated January 22, 2003. It provided, in pertinent part:

> This is to notify you that I have made the final decision to terminate your employment with South Central District Health pursuant to Idaho Division of Human Resources rule 190.01e (Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department) and to agency policy .230 Harassment-Free Workplace. As stated in my letter of January 14, 2003, this decision is based on your display of a pattern of behavior with customers that generated complaints that resulted in a performance improvement plan since August 2002 and followed by a complaint on January 9, 2003 from a new employee reporting feelings of intimidation and coercion while being trained by you.

Exhibit A, p. 67.

C. Appeal to Personnel Commission

Peska filed a timely appeal to the Commission on February 21, 2003. Following a two day evidentiary proceeding, the Hearing Officer determined that the District established, by a preponderance of the evidence, that Peska, over her period of employment at the District, conducted herself in a manner constituting insubordination, conduct unbecoming a State employee and detrimental to good order and discipline in the department subjecting herself to disciplinary action pursuant to Rule 190.01e. The Hearing Officer also found that Peska conducted herself in a manner such as to constitute harassment in violation of applicable Board of Health Policy.

As mentioned above, the Hearing Officer based his ruling, at least in part, on evidence presented at the hearing showing a history of problems the District experienced with Peska. Among the evidence relied upon and contained in the Hearing Officer's findings of fact, was a showing of problems including conflicts with co-workers and poor working relationship with staff (Exhibit B, pp. 15, 21, 24, 26, 28; Testimony of Meryl Egbert, Tr. pp. 187-192, 213-214), excessive use of sick leave and absenteeism (not relied upon as a reason for dismissal), attitude and demeanor problems (intimidation and abuse of authority) with food establishment owners when performing inspections (Exhibit I, p.2, Exhibit J, p. 2 Exhibit A, p. 29; Testimony of Meryl Egbert, Tr. pp. 192-197, 201-02), email policy violations (Exhibit B, p. 25, Exhibit A, p. 6, Testimony of Meryl Egbert, Tr. pp. 173-75), and improper use of an agency vehicle (Exhibit B, p. 30, Exhibit A, p. 10, Testimony of Meryl Egbert, Tr. p. 177-78). Peska timely appealed the Hearing Officer's decision to the Commission on January 5, 2004.

II.

ISSUES

(1) Was Appellant afforded the constitutionally-required due process by the District prior to her termination?

(2) Did the District prove by a preponderance of the evidence that Appellant violated the District's policy on Harassment-Free Workplace and/or Division of Human Resources and Personnel Commission Rule 190.01(e)?

III.

STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission is as follows:

> When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 29.01.01.201.06. That is, the burden of proof is one the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.
>
> On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse, or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Department of Welfare, IPC No. 94-03 (February 21, 1996), *aff'd*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

IV.

DISCUSSION

A. Due Process.

Classified public employees in Idaho have a property interest in their continued employment. *Fridenstine v. Idah Dep't of Admin.*, 133 Idaho 188, 190, 983 P.2d 842, 844 (1999) (citations omitted). The law is clear that Idaho public employees having a property interest in their continued employment cannot be deprived of this property interest without due process of law. *Arnzen v. State*, 123 Idaho 899, 904, 854 P. 2d 242, 247 (1993) (citing *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986); *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985)).

Due process, at a minimum, requires "notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond." *Id*.

(citing *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495). The first prong, notice, may be an "oral or written notification of the charges against the employee and the basis and evidence supporting those charges." *Id.* The employee is not entitled to a full, pre-termination, evidentiary hearing, nor is the employee entitled to physically receive all the evidence relied upon; all that is required is a sufficient account of the charges to put the employee on notice of what he/she allegedly did wrong in order to allow the employee to facilitate a meaningful response. *See Fredinstine*, 133 Idaho at 192; *Whittier v. Dep't of Health and Welfare*, 137 Idaho 75, 81-82, 44 P.3d 1130, 1136-37 (2002). The second prong, opportunity to respond, entails an opportunity for the employee, either in person, in writing, or both, to present his or her reasons "why proposed action should not be taken" and this opportunity must take place prior to termination. Arnz*en*, 123 Idaho at 904 (citation omitted).

The Commission is troubled by the apparent discrepancy between the NOCA and what was discussed at the January 21, 2003 meeting (Appellant's notice and opportunity to respond) when compared with the Letter of Termination issued January 22, 2003 and the majority of evidence presented at hearing and ultimately relied upon, at least in part, by the Hearing Officer in upholding the termination.

As mentioned earlier, herein, the NOCA provided notice to Appellant that:

> I am writing to notify you that I believe you are in violation of the Division of Human Resources rule 190.01e. (Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department) and Agency Policy .230 Harassment-Free Workplace. Your supervisor received **a written complaint from a new employee reporting feelings of intimidation and coercion,** including showing up at the employee's home on January 8, 2003 after work hours in spite of being told not to come. This infraction comes during a time of performance improvement planning efforts for you following **a Letter of Reprimand of August 20, 2002 for serious complaints by a customer related to your rude behavior and offensive language.**

> Because you violated the above rule after receiving a former written reprimand for similar behavior, I am now considering dismissal.

Exhibit A, p. 51 (emphasis added).

The NOCA effectively gave Appellant notice that the District was alleging as a factual basis for Rule 190.01e. and Agency Harassment Policy violation: (1) The January 8, 2003 Vonia Jackson complaint; & (2) August 20, 2002 Letter of Reprimand, which stemmed from the client survey and Performance Improvement Plan, all arising from the Quality Fresh Complaint (Exhibit A, p. 24).

From the facts presented at hearing and evident in the record, the Reprimand arose from the Quality Fresh Complaint and the subsequent client survey conducted in July 2002. The Performance Plan (Exhibit A, pp. 40-41) discussed the anticipated second client survey looking for improvement in customer-relation issues. Although Appellant completed the Performance Plan timeframe and went on food inspections with supervisors that "went ok", the second client survey and Appellant's evaluation with respect to the Performance Plan was never completed.

Director Junetenun's notes of the January 21, 2003 meeting where Appellant was given her opportunity to respond indicate only discussion of the Quality Fresh Complaint and the Jackson complaint at the meeting. Exhibit A, p. 65. This is consistent with what she was given notice, as referenced in the NOCA. Yet, the Letter of Termination based Appellant's termination as follows:

> "As stated in my letter of January 14, 2003, this decision is based on your display of **a pattern of behavior with customers that generated complaints** that resulted in a performance improvement plan since August 2002 and followed by a complaint on January 9, 2003 from a new employee reporting feelings of intimidation and coercion while being trained by you."

Exhibit A, p. 67 (emphasis added). The Commission cannot discern from the NOCA, or the "opportunity to respond" meeting, where notice was ever given to Appellant that her termination

was based upon a "pattern of behavior with customers" in order to allow a meaningful opportunity to respond prior to termination. If this "pattern" and "generated complaints" are connected to the client survey (and District-solicited responses) conducted in July, 2002, that the October 2002 Performance Plan addressed, the Plan was never completed and no follow-up survey was conducted to allow for an evaluation of Appellant, thereof. If it is somehow based upon a "former written reprimand for similar behavior" (other than the discussed August 20, 2002 Reprimand), this reliance is misplaced because the single written reprimand (other than the August 20, 2002 Reprimand) Appellant received on February 22, 2001 concerned completely different behavior- violation of the State's travel policy. There is no evidence in the record, testimony or otherwise, that Appellant was ever given a written reprimand for the behavior she was put on notice of in the NOCA (other than the August 20, 2002 Reprimand). With respect to the harassment allegation, neither the NOCA or even the Letter of Termination alleged a "pattern" with respect to the harassment allegation- both simply reference the Vonia Jackson complaint.

It is this "pattern" thesis that becomes the main thrust of the District's evidence at hearing and a multitude of evidence was presented that had no mention in the NOCA or in the January 21, 2003 meeting and much of which has no connection with the alleged basis for termination for which she was put on notice. This evidence included such things as conflicts with co-workers and poor working relationship with staff, excessive use of sick leave and absenteeism related to health problems, reliability and productivity issues, email policy violations, improper use of an agency vehicle, other rule violations such as taking another employee to a personal doctor's appointment and personal shopping. None of this evidence was made known to Appellant in the

NOCA or January 21, 2003 meeting, as an alleged basis for the ultimate termination on January 22, 2003, nor does it have any connection to the allegations for which she was put on notice.

The District also presented evidence, through exhibits and testimony, of various performance evaluations, all of which had overall "achieves job expectations", but which had certain areas where she fell below this standard. Exhibits J & K. The record evidences certain Special Evaluations in 1999 and 2000 addressing improvement plans for Appellant in various areas including customer relations (Exhibit H & I; Exhibit A, p. 5, 12), and evidence was also presented via exhibit or testimony of various food establishment owner complaints (Testimony of Fay Kemp, Tr. p. 557-568; Ida Sea complaint, Exhibit A, p.37). However, none of this evidence was mentioned or included as a basis for termination in the NOCA or discussed in the meeting of January 21, 2003.

Much of this evidence appears to have been instrumental to the Hearing Officer's preliminary order upholding the termination. Findings of Fact, Conclusions of Law and Decision on Appeal, pp. 2-4. It is also clear in the Conclusion of Law 1-2, pp. 6-7 of his preliminary order that the Hearing Officer based his decision on Appellant's behavior "over the period of her employment" and not specifically with respect to what was contained in the NOCA and what was discussed at the January 21, 2003 meeting.

From the NOCA and the "opportunity to respond" meeting of January 21, 2003, Appellant was effectively put on notice with respect to the January 8, 2003 Vonia Jackson complaint (the basis for the alleged harassment policy violation) and the Quality Fresh Complaint, which resulted in the client survey and August 20, 2002 Letter of Reprimand, as well as the October 2002 Performance Improvement Plan. Appellant was not afforded the constitutionally-mandated pre-termination due process with respect to any and all other

allegations and evidence presented at the hearing and relied upon by the Hearing Officer in his preliminary order.

She was not put on notice and provided sufficient basis and evidence that such a broad range of behavioral issues were being relied upon as reason for termination in the January 14, 2003 NOCA. Further, only the Quality Fresh Compliant and the Vonia Jackson complaint were discussed when Appellant had her opportunity to respond on January 21, 2003. She was not presented with sufficient notice in the NOCA to be able to provide a meaningful response at the January 21, 2003 meeting with respect to all various allegations eventually alleged and delved into at hearing before the Hearing Officer.

B . Proof of Cause for Discipline

The Commission is left with the question whether the District established proper cause for Appellant's termination by a preponderance of the evidence based on that basis and evidence of which the District provided the required due process (notice and opportunity to respond) to Appellant. To the extent the Hearing Officer so held, the Commission must examine whether there is substantial and competent evidence to support his findings of fact and conclusions of law with respect to the Vonia Jackson complaint and with respect to the Quality Fresh Complaint, the resulting client survey, August 20, 2002 Letter of Reprimand and the Performance Improvement Plan of October 9, 2002.

1. Quality Fresh Complaint and Resulting Action

Upon a review of the record (including 612 pages of transcript), the Commission concludes that there isn't substantial, competent evidence to support a finding that the District has shown just cause for termination pursuant to Rule 190.01e. based on the Quality Fresh Complaint, the resulting client survey, Letter of Reprimand and/or Performance Improvement Plan. The Quality

Fresh Complaint addressed Appellant's alleged conduct four (4) years prior during a food inspection and makes up the entire first page of the Complaint. Exhibit A, p. 24. There is scant evidence in the record as to how this alleged conduct was dealt with contemporaneously (in 1998) but evidently it was discussed, at least between Appellant and Egbert. Exhibit B, pp. 16-17. The Complaint also alleged that Appellant was telling customers that Quality Fresh product was bad and that it was costing Quality Fresh customer business. The Complaint named one particular customer by first name only, Debbie [Cottle] at Balanced Rock Coffee Shop and provided her phone number. Exhibit A, p 25.

There is no evidence that the District investigated either of the allegations of the Quality Fresh Complaint and no one from Quality Fresh testified at the hearing about the Complaint. No one contacted Cottle to investigate either, but she testified at the hearing completely refuting the disparagement allegations and explaining the background of the situation, as laid out in the Section I B. 1, herein. Tr. pp. 490-496. The District and the Hearing Officer appear to have simply accepted as fact the allegations of the Quality Fresh Complaint. This is not supported by the evidence.

From the uninvestigated, unsubstantiated (and actually refuted, in part) Quality Fresh Complaint comes the client survey, August 20, 2002 Letter of Reprimand and Performance Improvement Plan of October 2002. The Letter of Reprimand discussed the Quality Fresh Complaint and the resulting District-solicited responses to its client survey (approximately 50% good, 50% bad) and set up for the Performance Improvement Plan, implemented in October 2002. Exhibit A, p. 35. This Performance Plan sought improvement in customer relations on inspections. It was never fully completed. Supervisors did go out on surveys with Appellant as contemplated by the Plan and they "went ok" and the anticipated timeframe was completed in

early January but no anticipated second client survey was conducted as contemplated and no final evaluation of Appellant's performance on the Plan was ever completed. All indications are that she had improved on the Plan and on the directives and substance of the one-page August 20 Letter of Reprimand, and without the second client survey or formal evaluation of Appellant's performance on the Plan, there is not substantial and competent evidence to support a finding of any Rule 190.01e. violation based on the Letter of Reprimand or the Performance Improvement Plan.

2. Vonia Jackson Complaint

It is the January 8, 2003 training day complaint upon which the District based its allegations of violation of the Harassment-Free Workplace policy. NOCA, Exhibit A, p. 51. The Cindy Scott Christmas Party (Incident # 1) part of the complaint (Exhibit A, pp. 61-62) while not a basis for alleged policy and/or Rule 190.01e. violation, is relevant to the extent it sheds light on Jackson's mindset with respect to Appellant leading up to the January 8, training day. She felt "violated" by it. *Id* It is also important because certain statements Jackson made in the complaint surrounding the Christmas Party were refuted by Cindy Scott including one that Scott was "worried about retribution from Denise through her position as health inspector". Exhibit A, p. 62; Tr. p. 289. In fact, when she discovered the accusation after Appellant's discharge, she called Heidi Opheim to "make sure they understood that I did not fear retaliation from Denise." Tr., p. 290. During her testimony at the hearing, Scott also testified that she never told Jackson she was friends with Appellant because she "felt sorry for her," as Jackson also stated in her complaint (Exhibit A, p. 61; Tr., p. 299).

As explained earlier, the events of January 8 are highly disputed between Appellant and Jackson, at least from their perspectives. This is because the training day incident(s) involve

such a subjective tone. It is mostly all about how Jackson perceived Appellant's conduct and is all uncorroborated. No one else witnessed it to put it in an objective perspective.

Even though the Hearing Officer made no specific findings of credibility regarding the events of January 8, the Commission declines to do so and finds it unnecessary. Even accepting Jackson's version of the events, the Commission does not find that there is substantial and competent evidence to find Appellant's behavior rose to a level of harassment as defined by agency policy.

Harassment is defined in Agency Policy .230-A as:

> Work-place harassment is defined as any uninvited, unwelcome, or inappropriate non-job-related conduct including retaliation that causes an employee or visitor to feel threatened, intimidated, demeaned, or distressed in the District work environment. The work environment is any District office or location where an employee is conducting work on behalf on (sic) the District.
>
> Examples of harassment include, but are not limited to:
>
> *Physical conduct:* Unwelcome touching, standing too close, leering, threatening, staring or glaring, or obscene, threatening or offensive gestures.
>
> Weapons such as knives and firearms must not be in possession when conducting district activities, including in personal vehicles.
>
> *Verbal or written conduct:* References to private body parts; derogatory or demeaning comments, public criticism, insults, swearing, inappropriate jokes, music, or personal questions; sexual innuendos; offensive remarks about race, gender, religion, age, ethnicity, educational level, physical or mental status, disability, political beliefs, marital status, veteran status, univited proselytizing; obscene letters, telephone calls, or email; catcalls, whistles sexually suggestive sounds, or loud and abusive comments.
>
> *Visual or symbolic:* Display of pictures of nude or scantily clad (except in appropriate clinical settings) or offensively clad people; display of intimidating religious, political or other symbols; display of offensive, threatening or demeaning drawings, cartoons or other graphics; offensive T-shirts, coffee mugs or other articles.

Jackson's feelings about being trained by Appellant must be taken into account. Partly stemming from the Cindy Scott episode, she's apprehensive about training with Appellant and didn't want to be[3]. Tr. pp. 367-69. She's not looking forward to another training day and immediately she's irritated because she thinks Appellant is looking over her shoulder (Exhibit A, p. 57, 1st paragraph) and her subjective interpretations roll on from there throughout the day including feeling that Appellant "overstressed" her training status and made her "sound incompetent" (at least to Jackson). Exhibit A, p. 57. There is also much emphasis placed on an apparent issue whether Jackson would ride with Appellant to Hagerman in the afternoon and over Jackson taking her purse with her or leaving it in Appellant's car in Hagerman. Jackson is further bothered by Appellant's "butting in" at the septic tank site. *Id.* p. 59. It is also obvious that Jackson takes issue with phone calls from Appellant later that evening and the next morning involving questions about Jackson's conversation with Egbert, as well as future training dates and the training video drop off. *Id.* Finally, Jackson complains of Appellant dropping off the training video on the 9th at her house shortly after work, leaving it with her husband because Jackson wasn't there. *Id*. p. 60. At this point, Appellant did not know she would no longer be training Jackson or that Jackson had asked to not be trained by her.

Appellant's conduct on January 8 and 9, as alleged and described by Jackson, certainly, at times, amounted to what a reasonable person would characterize as direct, blunt, certainly bad-mannered, even socially unacceptable perhaps, but did not rise to the level of workplace harassment, especially when comparing it to the laundry list of examples provided in the Agency policy .230-A. Therefore, the Jackson complaint, even accepting Jackson's full account doesn't

[3] Respondent in briefing, contends she didn't even have to train with Appellant and therefore had no need to create a reason to get out of training with her, but the record indicates that she at least thought she "needed to get trained". Tr. p. 387, and even referencing Egbert's Incident Report concerning Jackson's request to not be trained, the corrective action taken was evidently for Egbert to request that Appellant be removed as Jackson's trainer. Exhibit A, p. 50.

constitute substantial and competent evidence to support a finding that the District has proven workplace harassment, and thus violation of Rule 190.01e., by a preponderance of the evidence.

V.

CONCLUSION

For the reasons stated above, the Hearing Officer's determination that Appellant was properly terminated is REVERSED. The Commission finds that due process was not afforded regarding most of the evidence and basis for discharge and there is not substantial and competent evidence to support a finding of just cause for termination based upon the evidence and basis for which Appellant was afforded due process.

Based upon the Commission's findings, it is HEREBY ORDERED, pursuant to Idaho Code § 67-5316(4), that Appellant shall be reinstated in the same position or a position of like status and pay at the District. Appellant is also legally entitled to reimbursement of all pay for the period of discharge.

IT IS SO ORDERED.

The parties are responsible for their own attorney fees and costs.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

(1) That the findings of fact are not based on any substantial, competent evidence;

(2) That the commission has acted without jurisdiction or in excess of its powers;

(3) That the findings of fact by the commission do not as a matter of law support the decision.

Idaho Code § 67-5318.

DATED this ____ day of July, 2004.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

_____
Mike Brassey, Commission Chair

_____
Don Miller, Commissioner

_____
Pete Black, Commissioner

_____
Clarisse Maxwell, Commissioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the DECISION AND ORDER ON PETITION FOR REVIEW in *Peska v. South Central Health District*, IPC No. 03-12, was delivered to the following parties by the method stated below on the ___ day of July, 2004.

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_____
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Secretary to Chair